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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1856

LARRY PONCIANO, *et al.*,

Petitioners,

vs.

UNITED FARM WORKERS ORGANIZING COMMITTEE, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Fifth Appellate District.

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No. .....

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vs.

UNITED FARM WORKERS ORGANIZING COMMITTEE, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of the State of California, Fifth Appellate District.

The petitioners, Larry Ponciano, Mary Delay, Albert Martinez, Hazel Hernandez, Bob Elaydo, Gloria Muro, Ofira Gracia, and Yolanda Silva, respectfully pray that a writ of certiorari issue to review the final judgment and opinion of the Court of Appeal of the State of California for the Fifth Appellate District, an intermediate appellate court, entered in this proceeding on January 26, 1976, a copy of the opinion being attached hereto marked Appendix "A". Review was denied by the Supreme Court of California in an order dated March 24, 1976 denying a petition for hearing (App. "B").

Opinion Below.

The opinion of the Court of Appeal dated January 26, 1976 set forth in Appendix "A", affirmed the judgment of the Superior Court of Kern County, California, which had sustained a demurrer on two grounds, namely (1) the provisions of the collective bargaining agreements have been declared not to violate any rights of the federal or state constitutions; and (2) they have been declared not to involve any "state action" by California, and therefore "plaintiffs cannot invoke the protection of the federal constitution."

Jurisdiction.

This petition for a writ of certiorari is being filed within ninety days of the time of final judgment of the Court of Appeal. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

Questions Presented.

1. Does a union shop agreement between employer and union requiring full membership in the union by all employees, coupled with an exclusive union hiring hall, and forbidding everything regarded by the union as anti-union activity, where such agreement is entered into under the statutory and common law of the state, violate the First, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States and the statute, 42 U.S.C. § 1983, making liable every person who under color of any statute, custom or usage of a state deprives another person of any rights, privileges, or immunities secured by the Constitution?

2. Is there governmental action by California where compulsory full membership in the union is required

by an agreement between union and employer authorized, encouraged, protected and made enforceable at law and in equity under the statutes of the state, as well as under its common law, both as expressly so construed to that effect by the highest court of the state?

3. Does the case present important questions of constitutional law which should be settled by this Court?

4. Does the case present an issue of major public importance?

Constitutional and Statutory Provisions Involved.

Petitioners invoked in the Superior Court and in the Court of Appeal the protection of their rights under the First, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States. They also invoked 42 U.S.C. § 1983, making every person who under color of any statute, custom or usage of a state deprives another person of any rights, privileges, or immunities secured by the Constitution, liable to the party injured in an action at law or suit in equity.

Petitioners claimed that they were subjected to injury and damages by the respondents acting under the Labor Code of California, §§ 921-923, 1011, 1012, 1015-1018, and 1126, the Business and Professions Code of California, § 16703, as well as by the common law of the State, all as authoritatively interpreted by the Supreme Court of California, its highest court.

The constitutional and statutory provisions named above appear at pages 19-29 of the Appendix.

Statement of the Case.

Petitioners are farm workers employed in the vineyards of respondent growers. They brought a class action in the Superior Court of Kern County, California against the employers and the union. They sought relief because of an agreement between the employers and the union requiring compulsory full union membership as a condition of employment, asking for an injunction, for declaratory relief and for damages. They allege that the full union membership requirement is accompanied by other harsh, arbitrary and illegal conditions, including (1) an exclusive union hiring hall, (2) priority of employment of strikers, and (3) the right of the union to force the discharge of any employee who is determined by the union to be engaged in anti-union activities.

Plaintiffs allege that the union at no time has represented a majority or a substantial proportion of the workers involved. They allege that they and members of their class have been threatened with discharge from employment, have, in fact, been discharged, demoted, subjected to job classification, discrimination and transfer, and have been refused employment by reason of the enforcement of the union shop contract. They also allege violation of the constitutional provisions already mentioned, and both in the Superior Court and the Court of Appeal they invoked the Equal Protection Clause of the Fourteenth Amendment.

REASONS FOR GRANTING THE WRIT.

I

Decision Below Is Contrary to Decisions of This Court.

1. California Has Taken State Action by Authorization, Protection and Encouragement of Union Shop.

In concluding that California has taken a position of benign neutrality towards the union shop and has in effect left it unregulated, the Court of Civil Appeal below has gone squarely contrary to the interpretation by the Supreme Court of California of §§ 920-923, 1115, 1122, and other provisions of the Labor Code of the State. The highest court of the state in *Chavez v. Sargeant,* 52 Cal.2d 162, 339 P.2d 801 (1959), said that the state laws "continue to permit, to encourage and to protect collective bargaining agreements which * * * must include reasonable union security clauses * * *." 52 Cal.2d at 196-97. It condemned the county right to work ordinance there in issue because it contravened "the legislatively declared state-wide policy" to authorize negotiations for union security[1] (52 Cal.2d at 213-14).

Similarly, the highest state court held in *Stephenson v. City of Palm Springs,* 52 Cal.2d 407, 340 P.2d 1009 (1959), that a city ordinance prohibiting closed and union shop agreements was invalid because it was in conflict with the state Labor Code:

> "It is the announced intention of the Palm Springs ordinance (§ 2920) 'to prohibit closed shop and

[1] "Union security agreement" is a general term covering various arrangements such as the closed shop, the union shop and the agency shop under which workers are forced into a union as a condition of employment or are forced to support it financially.

union shop agreements of any type which are neither prohibited nor authorized by state laws.' But this stated intention * * * is immediately contravened by the fact that * * * the subject ordinance purport[s] to declare that all closed and union shop agreements are illegal, void, and criminal, whereas under state law (Lab. Code, §§ 920-923, 1115-1122, 1126) * * *, such agreements are encouraged and protected." 340 P.2d at 1010.

In the two cases just cited, as well as in *Retail Clerks Union v. Superior Court,* 52 Cal.2d 222, 226, 339 P.2d 839 (1959), the Court held invalid city and county right to work ordinances because of conflict with the common law and the statutory law of the state.

2. Government Compulsion Not Necessary Element of State Action.

The principal ground of decision in the court below was that state action was not present in the execution and enforcement of the union shop agreement because California had not compelled such action. In so holding, its principal reliance was upon its own previous decision in *Gabaldon v. United Farm Workers Organizing Committee,* 35 Cal.App.3d 757 (1973), hg. den., Cal.Sup.Ct. Jan. 31, 1974, cert. den., 416 U.S. 957 (1974), and the decision of the Court of Appeals for the Ninth Circuit in *Mendoza v. United Farm Workers Organizing Committee,* 487 F.2d 311 (9th Cir. 1973), cert. den., 412 U.S. 918 (1974). But this Court is obviously not precluded by the denial of review by the Supreme Court of California. Nor is it precluded by its own denial of certiorari in *Gabaldon* and *Mendoza.* This Court has frequently held that the "denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States v. Carver,* 260 U.S. 482, 490 (1923); *Atlantic Coast Line R. Co. v. Powe,* 283 U.S. 401, 403, 404 (1931).

This Court has held that governmental compulsion is not an essential element of state action. *Railway Employees' Dept., AFL v. Hanson,* 351 U.S. 225, 231, 232 (1956); *Reitman v. Mulkey,* 387 U.S. 369, 379 (1967).

In *Terry v. Adams,* 345 U.S. 461 (1953), and in *Smith v. Allwright,* 321 U.S. 649, 663-64 (1944), the Court found governmental action in the exclusion of Negroes from primaries of a private political organization notwithstanding the circumstance, as stated in *Terry,* that "no state law directed such exclusion." 345 U.S. at 462.

Governmental regulation of a streetcar line permitting but not requiring it to broadcast radio programs on its cars was held to constitute governmental action in *Public Utilities Commission v. Pollack,* 343 U.S. 451 (1952).

The governing rule pronounced by this Court is that sufficiently substantial participation by the state is shown wherever it authorizes, permits, encourages, or protects the practice or significantly involves itself in its accomplishment. *United States v. Guest,* 383 U.S. 745 (1966); *Robinson v. Florida,* 378 U.S. 153 (1964); *Anderson v. Martin,* 375 U.S. 399 (1964); *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961); *American Communications Ass'n v. Douds,* 339 U.S. 382, 401-402 (1950); *Marsh v. Ala-*

bama, 326 U.S. 501 (1946); *McCabe v. Atchison, T. & S. F. R. Co.,* 235 U.S. 151 (1914).

3. Authorization by State Statute Constitutes Governmental Action.

The decisions of the Supreme Court of California in *Stephenson, Chavez,* and *Retail Clerks Union* mentioned *supra,* are closely analogous to *Railway Employees' Dept., AFL v. Hanson, supra,* 351 U.S. 225, 231-32 (1956), where this Court considered whether governmental action was present in a restricted form of union shop agreement made pursuant to the Railway Labor Act, 45 U.S.C. § 152, Eleventh. When that statute was enacted in 1926, it contained no provisions with respect to compulsory union membership. When it was extensively amended in 1934 it specifically prohibited this arrangement. This action was taken largely as the result of the recommendations of Joseph B. Eastman, Federal Coordinator of Transportation, during the great depression, who characterized any form of compulsion of this sort as a "vicious practice." *Int'l Ass'n of Machinists v. Street,* 367 U.S. 740, 752 (1961). In 1951, however, Congress following the precedent set by the Labor Management Act of 1947, 29 U.S.C. § 168(a)(3), inserted in the Railway Labor Act an amendment authorizing a carrier and a labor organization to make an agreement requiring as a condition of continued employment that all employees shall become members of the labor organization representing their craft or class, except that no such agreement shall impose such a requirement on employees to whom membership is not available upon a nondiscriminatory basis, or with respect to whom membership was denied or terminated for any reason other than failure to pay the required dues, initiation fees,

and assessments. 45 U.S.C. § 152, Eleventh. The amendment specified that such an agreement "shall be permitted * * * notwithstanding any other provisions of this Act or of any other statute or law of the United States * * * or of any state * * *." It prescribed in detail the way in which such an agreement should be executed, differing in this respect from state laws on the subject. Section 152, Eleventh, pars. (b) and (c).

Counsel for the labor organizations seeking to sustain the special form of union shop under attack there advanced the same contentions about state action as the court below here. They argued as one of their principal defenses that the authorizing amendment was a limitation upon the power of government, and not a limitation upon the conditions that may be imposed upon contracts between non-governmental parties. Congress, they stressed, has not required union membership by law and has not required the making of any union shop agreements (351 U.S. 231-32). This Court overruled those contentions, adding that neither lack of such a mandatory requirement, nor the fact that inclusion of a union shop clause in the collective bargaining agreement was optional with the parties, demonstrated the absence of governmental action, saying:

> "The union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements * * *. The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." 351 U.S. at 231, 232.

The Court also held that governmental action was present because the effect of the amendment was to strike down the right to work provision of the state constitution of Nebraska, where the litigation originated. 351 U.S. at 232. But it did more than that, for the special kind of union shop authorized by the federal statute was different from that of any of the states and it superseded the laws on the subject of all of them. Apparently for this reason the Court held that congressional authorization of the agreement was also conclusive evidence of state action.

Just as a state may not prohibit a railway union shop agreement because the federal government has occupied the field by authorizing such an arrangement, so in California a county or a city may not pass an ordinance banning such an agreement in other areas, because the state has not only authorized the agreement but has also approved, encouraged and protected it and made it enforceable at law and in equity. The state has obviously gone further than merely to occupy the field with a policy of benign neutrality thereby displacing county or municipal action on the subject. It has struck down the local ordinances not on the sole ground that the state had already occupied the field, but also on the further ground that the city and county action was in conflict with the statutes of the state authorizing, approving, encouraging and protecting the agreements, thus taking governmental action equally as strong, if not stronger, than the one considered by the federal court to be sufficient in *Hanson* which merely permitted the arrangement.

The court below in *Gabaldon* went to considerable length in attempting to draw distinctions between that case and *Hanson*. None of them are valid.

First, it indicated that § 2, Eleventh was enacted for the purpose of superseding inconsistent right to work laws in seventeen states which then prohibited union shops. But it ignored the fact that the federal statute was of such a unique character that it superseded all state laws on the subject.

Second, it said that the California statute, which has been interpreted to occupy the field and thus preempt inconsistent right to work ordinances, does not, as the Railway Labor Act, expressly refer to union shops. The short answer here is that the Supreme Court of California had interpreted those state statutes as authorizing, encouraging and protecting union shops, and the construction given to a state statute by the highest court of the enacting jurisdiction is conclusive. *NAACP v. Button,* 371 U.S. 415, 432 (1963); *Minnesota Ex Rel. Pearson v. Probate Court,* 309 U.S. 270 (1940); *Hebert v. Louisiana,* 272 U.S. 312, 317 (1926). It was clearly inadmissible for an intermediate Court of Appeal to overrule the construction of the state statute by the Supreme Court of the state.

Third, the Court pointed out that the union shop has always been lawful in California, and any approval given to it by the lower court did not change the traditional policy of the state. But the California Supreme Court relied primarily upon the provisions of the Labor Code, and if those provisions deprived the plaintiffs of their rights under the federal constitution the deprivation necessarily flowed in part from the Labor Code so relied upon. Moreover, the Fourteenth Amendment was passed to override the deprivation of federal constitutional rights not only by state statutes but also by their common law as well as

by any of their ordinances, regulations, customs or usages. It was not confined to the protection of these rights of black citizens, but was deliberately made universal in scope. Again, 42 U.S.C. § 1983 imposes liability on every person "who, under color of any statute, ordinance, regulation, custom or usage of any state * * * subjects * * * any citizen * * * to the deprivation of any rights, privileges or immunities secured by the Constitution." While the common law of the state is not singled out for separate mention under this statutory provision, it may hardly be doubted that it has equal force with custom or usage.

Fourth, the lower court in *Gabaldon* relied upon *Otten v. Baltimore & O. R. Co.*, 205 F.2d 58 (2d Cir. 1953), and *Wicks v. Southern Pacific Co.*, 231 F.2d 130 (9th Cir. 1956), *cert. den.* 351 U.S. 946, two cases which held that § 2, Eleventh of the Railway Labor Act did no more than to repeal *pro tanto* § 2, Fourth and Fifth of RLA. But those cases were overruled *sub silentio* in *Hanson*; they were based upon the erroneous theory that the subsequent statute did nothing more than this when, as already shown, it authorized throughout the United States a special form of union shop unknown to the common law.

The distinctions attempted to be drawn by the Court in *Gabaldon* between *Hanson* and a case like the present one, were dissipated when the Supreme Court came to decide a case raising issues in large part the same as those presented in *Hanson*, and clearly recognized that the attenuated form of union shop authorized by § 2, Eleventh of the Railway Labor Act raised issues beyond those in *Hanson* relating to payments for defraying the costs of collective bargaining which constituted constitutional questions of the utmost

gravity. *International Asssociation of Machinists v. Street*, 367 U.S. 740, 749 (1961). They are for the most part the issues raised by the case at bar.

4. Other Cases Hold Official Authorization of Private Conduct Constitutes State Action.

In *McCabe v. Atchison, T. & S.F. R. Co.*, 235 U.S. 151 (1914), the Court held that state authorization of private conduct constitutes state action for constitutional purposes.

More recently, this Court in a consolidated case, *Reitman v. Mulkey*, 387 U.S. 369, 379 (1967), considered the complaints of two Negro couples who claimed that they had been discriminated against in housing. The first couple had concededly been discriminated against when refused the lease of an available apartment. The second was brought by a couple seeking to enjoin eviction from their apartment allegedly because of the race of the husband. In both cases, the acts of discrimination were by private parties who sought to justify their conduct by Article I, § 26, incorporated in the Constitution of California through approval by the voters of Proposition 14 in the General Election of 1964, providing that neither the state nor any of its agencies shall abridge the right of any person to sell, lease or rent his residential property to such person as he chooses. The immediate and direct purpose of Proposition 14 was to reinforce the constitutional rights of owners of real property. The real if indirect purpose was to enable property owners to avoid compliance with the Rumford and Unruh Acts directed against racial discrimination. The Supreme Court of California held state action to be present because it has been consistently found where the state in any meaningful

way has lent its processes to the achievement of discrimination. This Court affirmed saying in part:

> "The assessment of § 26 by the California court is similar to what this Court has done in appraising state statutes or other official actions in other contexts. In *McCabe v. Atchison, Topeka & Santa Fe R. Co.* * * * the Court dealt with a statute which * * * authorized carriers to provide cars for white persons but not for Negroes. * * * [T]he Court made it clear that such a statute was invalid under the Fourteenth Amendment because a carrier refusing equal service to Negroes would be 'acting in the matter under the authority of a state law.' This was nothing less than considering a permissive state statute as an authorization to discriminate and as sufficient state action to violate the Fourteenth Amendment in the context of that case." 387 U.S. at 379.

The lower court in *Gabaldon* considered the later case of *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972) as being to the contrary and as governing. But this Court in *Moose Lodge* cited with approval its decision in *Reitman v. Mulkey, supra,* and clearly indicated that there was no intention to overrule the holding there made, saying:

> "Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations,' Reitman v. Mulkey, * * * in order for the discriminatory action to fall within the ambit of the constitutional prohibition." 407 U.S. at 173.

A little later on, the Court distinguished the ruling of the Court in *Moose Lodge* from that in *Reitman v. Mulkey* in a way connoting approval of both of them as not only right but consistent with one another, saying:

> "However detailed this type of regulation [in Moose Lodge] may be in some particulars, it cannot be said to in any way foster or encourage racial discrimination." 407 U.S. at 176, 177.

5. Compulsory Full Union Membership Violates Constitutionally Protected Right to Work.

Freedom of opportunity to engage in the common occupations of life is a fundamental constitutional right secondary in importance only to the right to life. All save for a small fraction of mankind must work for a living and denial of the opportunity to earn a livelihood is one of the gravest infringements on the liberty of the individual. Every man has an inherent right to an opportunity to seek and retain the gainful employment which he desires, for which he may be fitted, and which is available in a free society and in an economy of free enterprise. Just as it may not be wholly denied, the right to work may not be fettered by artificial and unnecessary restrictions or the imposition of unreasonable or arbitrary conditions such as a requirement of union membership.

Cummings v. Missouri, 71 U.S. (4 Wall.) 277 (1867); *Ex Parte Garland,* 71 U.S. (4 Wall.) 333 (1867); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886); *Meyer v. Nebraska,* 262 U.S. 390 (1923); *Takahashi v. Fish and Game Commission,* 334 U.S. 410 (1948); *Wieman v. Updegraff,* 344 U.S. 183 (1952); *Slochower v. Board of Education,* 350 U.S. 551 (1956); *Smith v. Texas,* 233 U.S. 630, 636, 638 (1914).

In *Truax v. Raich*, 239 U.S. 33 (1915), this Court affirmed an injunction against the enforcement of a state quota law which deprived alien restaurant workers of their right to work. Mr. Justice Hughes in holding that the prescribed quota contravened the Fourteenth Amendment, declared:

> "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure." 239 U.S. at 41.

The opinion of Mr. Justice Hughes in that case was relied upon by the Court in *Sugarman v. Dougall*, 413 U.S. 634 (1973), in sustaining an injunction against the enforcement of a section of the New York Civil Service law disqualifying resident aliens from employment. The Court stated:

> "It is established, of course, that an alien is entitled to the shelter of the Equal Protection Clause. * * * This protection extends, specifically, in the words of Mr. Justice Hughes, to aliens who 'work for a living in the common occupations of the community.' Truax v. Raich, 239 U.S. at 41." (413 U.S. at 641).

In a second recent case, *In Re Griffiths*, 413 U.S. 717, 719, 720 (1973), the principle of *Truax v. Raich* was likewise relied upon by the Court in striking down a rule of a state court refusing an alien the right to engage in the practice of the law.

6. Compulsory Full Union Membership Violates Freedom of Association.

The freedom of association is a fundamental right guaranteed by the Constitution of the United States. It is a composite right derived from freedom of speech, freedom of assembly, freedom of petition, as well as the general right to liberty of action. It accords to the individual the right to order his life as he sees fit, to choose his occupation, his place of employment, and what, if any, political party, fraternal order, club, union or other private organization he will join and support.

This Court has repeatedly declared that the right of association is not only guaranteed by the Federal Constitution, but is one of the most fundamentally important of the rights secured by that instrument.

In *Bates v. Little Rock*, 361 U.S. 516 (1960), the Court said:

> "Like freedom of speech and a free press, the right of peaceable assembly was considered by the Framers of our Constitution to lie at the foundation of a government based upon the consent of an informed citizenry—a government dedicated to the establishment of justice and the preservation of liberty. U. S. Const.,' Amend. I. And it is now beyond dispute that freedom of association for the purpose of advancing ideas and airing grievances is protected by the Due Process Clause of the Fourteenth Amendment from invasion by the States." 361 U.S. at 522-523.

Many cases are to the same effect. *United States v. Robel,* 389 U.S. 258, 263 (1967); *Keyishian v. Board of Regents of New York,* 385 U.S. 589 (1967); *Elfbrandt v. Russell,* 384 U.S. 11, 18 (1966); *Williams v. Rhodes,* 393 U.S. 23, 30-31 (1968); *Schneider v. Smith,* 390 U.S. 17 (1968); *Griswold v. Connecticut,* 381 U.S. 479 (1965); *NAACP v. Button,* 371 U.S. 415 (1963); *Gibson v. Florida Investigation Committee,* 372 U.S. 539, 543-544 (1963); *Louisiana v. NAACP,* 366 U.S. 293 (1961); *Shelton v. Tucker,* 364 U.S. 479 (1960); *NAACP v. Alabama,* 357 U.S. 449 (1958); *DeJonge v. Oregon,* 299 U.S. 353, 364 (1937).

If men are to be free to join unions, they must also be free not to join. They have not merely the right of association, which might narrowly be construed to give them the right to join an organization of their choice. But the freedom of association is broader. It gives the right to the individual to choose—to elect to join or not to join available organizations. Unless he is free not to join he has no real freedom of association at all, but merely a duty or obligation to join an organization selected not by himself but by others, which is the essence of coercion and the very antithesis of the freedom of choice of the individual which is the core of American constitutional liberty. The right to be free from a requirement to join a union as a condition of employment is an essential ingredient of the freedom of association just as freedom of speech includes freedom to remain silent. *Board*

of Education v. Barnette, 319 U.S. 624, 638 (1943). As the Supreme Court of Maine declared in *Pappas v. Stacey,* 151 Me. 36, 116 A.2d 497, *appeal dismissed,* 350 U.S. 870 (1955):

> "Freedom to associate of necessity means as well freedom not to associate." 116 A.2d at 500.

II

Case Presents Important Question of Constitutional Law Which Should Be Settled by This Court.

1. Freedom of Association and Right to Work Are Internationally Recognized.

The recognition of the fundamental character of the freedom of association and the right to work is not confined to the United States. In country after country in the free world, especially in Western Europe, the right to work or the freedom of association, or both, are embedded in the law and are held to invalidate compulsory union membership. Lenhoff, *The Problem of Compulsory Unionism in Europe,* The American Journal of Comparative Law, Winter 1956, Vol. 5, No. 1, pp. 18-43. One recent exception is England, but it has been attended by disastrous consequences.

When after World War II the General Assembly of the United Nations in 1948 promulgated its Declaration of Human Rights, it took pains to reaffirm those fundamental rights of man that had been violated under totalitarian, Nazi and Fascist regimes in Germany and Italy. It declared that they should not be permitted in the future. Article 20 of the Declaration states that:

"1. Every one has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association."

The right to work is expressly protected in § 1 of Article 23 which reads:

"Every one has the right to work, to free choice of employment, to just and favorable conditions of work, and to protection against unemployment."

The Declaration, of course, is not binding on this Court. But it goes to show the far-reaching and world-wide importance of these rights and the gravity of their violation is a reversion to ancient tyrannies revived under Nazism and Fascism.

The constitutional principles of freedom of association and the right to work as enunciated by this Court are in accordance with the enlightened conscience of mankind. The lower standards authorized, permitted, encouraged and protected under California law, cannot be continued in force without going contrary to rights and freedoms not only protected by the Constitution of the United States, but also expressly declared by the Declaration of Human Rights of the United Nations. They are contrary also to the principles governing the large body of employees covered by the National Labor Relations Act, 29 U.S.C. § 158(a)(3), and the Railway Labor Act, 45 U.S.C. § 152, Eleventh, where the union shop is restricted to a requirement for the payment of initiation fees and dues, and in some cases assessments, to cover the costs of collective bargaining and the settlement of grievances. *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963).

III

Case Presents Issue of Major Public Importance.

The California Court of Appeal in a decision denied review by the Supreme Court of the State has enforced a rule directly contrary to the decisions of this Court on important questions of constitutional law. This Court in case after case, for instance, has decided that where private parties are acting under the authority of a state or where their action presents some other form of significant state involvement, governmental action is present. The court below has decided to the contrary in holding that governmental action is not present unless the private parties are acting under compulsion of the state. This question and the related questions of violations of freedom of association and the right to work are of too much importance in our national life to be left unsettled. They should be settled by this Court in keeping with its past decisions.

The question whether a citizen of the United States in modern times may be compelled against his will to belong to a private organization as a condition of employment and to be subject to its direction and control in important matters affecting his livelihood, is one of major public importance. It is sharply raised in the case at bar.

Millions of employees, including agricultural workers such as petitioners, as well as public employees, are excluded for one reason or another from the coverage of the two federal labor relations statutes, and the protection of their fundamental rights is a matter of serious national concern, and one justifying the intervention of this Court.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal, Fifth Appellate District of the State of California.

Dated: June 22, 1976.

Respectfully submitted,

REX H. REED,
RICHARD B. ISHAM,
JONATHAN C. GIBSON,
Counsel for Petitioners.

APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Fifth Appellate District.

Larry Ponciano et al., Plaintiffs and Appellants, v. United Farm Workers Organizing Committee et al., Defendants and Respondents. 5 Civil No. 2419 (Sup. Ct. No. 111447).

Filed: January 26, 1976.

APPEAL from a judgment of dismissal* of the Superior Court of Kern County entered after sustaining of the demurrer of defendants without leave to amend Walter Osborn, Jr., Judge. Affirmed.

Rex H. Reed, Gibson & Kennerson, Jonathan C. Gibson and Richard B. Isham for Plaintiffs and Appellants.

Jerome Cohen, Barbara Rhine, Peter Haberfeld and Deborah A. Vollmer for Defendants and Respondents.

Plaintiffs appeal from an order[1] sustaining a demurrer to their complaint without leave to amend.

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*See footnote 1.

[1]An order sustaining a demurrer without leave to amend is non-appealable. In the interest of the orderly administration of justice, however, we decline to dismiss on that ground and will order the trial court to enter a judgment of dismissal *nunc pro tunc* and will treat the notice as a notice of appeal from the judgment to be entered. (Evola v. Wendt Construction *Co.* (1958) 158 Cal.App.2d 658, 660-661; *Zellers v. State of California* (1955) 132 Cal.App.2d 56, 57.)

The named plaintiffs are farm workers. The defendant United Farm Workers Organizing Committee (hereinafter "union") is an unincorporated labor organization, and the other defendants are major growers of agricultural crops in the southern San Joaquin Valley of California. In sum, plaintiffs seek to invalidate a union shop provision in a collective bargaining labor contract between the union and the growers on the ground that it violates various constitutional rights accorded to them by the United States Constitution. They pray for damages, a declaration of rights and an injunction against enforcing the provisions of the contract.

This case is companion to *Gabaldon v. United Farm Workers Organizing Committee* (1973) 35 Cal.App.3d 757 (hg. den. January 31, 1974, cert. den. (1974) 416 U.S. 957 [94 S.Ct. 1972; 40 L.Ed. 307]), which was commenced against the same defendants, regarding the same collective bargaining agreement and seeking the same relief by different party plaintiff farm workers. The case at bench therefore presents identical issues as those that were before us in *Gabaldon*.

In what we thought to be a definitive opinion, the court decided the *Gabaldon* case in favor of the defendant union and growers on the ground that ". . . state action was not involved in the making or implementation of the collective bargaining contract between the union and the growers [and] plaintiffs cannot invoke the protection of the federal Constitution. . . ." (35 Cal.App.3d at 768.)

Plaintiffs have presented no new authorities or issues.[2] They merely re-present and reargue the same issues and authorities that were thoroughly briefed and discussed in *Gabaldon*, and we consider that case and the authorities therein dispositive.

The superior court is ordered to enter a judgment of dismissal *nunc pro tunc* as of the earliest date it could have been entered; the notice of appeal will be deemed an appeal from said judgment, and said judgment is affirmed.

/s/ Brown (Geo. A.), *P. J.*

We concur:

/s/ Gargano, *J.*

/s/ Carkeet, *J.**

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[2]It is true that in *Gabaldon* we expressed doubt "that plaintiffs have sufficiently alleged action under color of state law . . ." (*Gabaldon v. United Farm Workers Organizing Committee, supra*, 35 Cal.App.3d at p. 762, fn. 4) and that in the case at bench plaintiffs alleged what they considered to be state action. However, we did not decide the *Gabaldon* case on the ground of inadequate allegations of state action but assumed those allegations to be present. The inclusion therefore of the allegations of state action in the instant complaint, which we assumed to be present in the *Gabaldon* action, does not change the result herein.

*Retired judge of the superior court sitting under assignment by the Chairman of the Judicial Council.

APPENDIX B.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

March 24, 1976

I have this day filed Order Hearing Denied.

In re: 5 Civ. No. 2419, Ponciano vs. United Farm Workers Organizing Committee.

Respectfully,

G. E. Bishel
Clerk

APPENDIX C.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Fifth Appellate District.

Josephine Gabaldon et al., Plaintiffs and Appellants, v. United Farm Workers Organizing Committee et al., Defendants and Respondents. 5 Civil No. 1736 (Sup. Ct. No. 70106).

Filed: December 4, 1973.

APPEAL from a judgment of the Superior Court of Tulare County. John Locke, Judge. Affirmed.

Rex H. Reed, Gall, Lane, Powell & Kilcullen, John L. Kilcullen, Gibson & Kennerson, Jonathan C. Gibson, Jacobus, Isham & Humpal, Frederic A. Jacobus and Richard B. Isham for Plaintiffs and Appellants.

Cohen, Farnswort' Denison, Carder & Engelhardt and Stephen Engelhardt for Defendants and Respondents.

Plaintiffs appeal from a judgment on the pleadings in favor of the defendants rendered on the ground their complaint does not state facts sufficient to constitute a cause of action.

A motion for judgment on the pleadings is treated identically to a demurrer. (*Welshans v. City of Santa Barbara* (1962) 205 Cal.App.2d 304, 305.) Consequently, the facts alleged in the complaint must be assumed to be true and liberally construed in favor of the party against whom the motion is made. (*Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 275; *Semole v. Sansoucie* (1972) 28 Cal.App.3d 714, 719.)

The named plaintiffs are farm workers. The defendant United Farm Workers Organizing Committee (hereinafter "union") is an unincorporated labor oganization; the other defendants are 26 major growers (hereinafter "growers") of agricultural crops in the southern San Joaquin Valley. The plaintiffs commenced this class action on behalf of themselves and others similarly situated, alleging that on July 29, 1970, the union and growers entered into a collective bargaining agreement; they complain that some of the provisions of the contract, hereinafter summarized, have deprived the plaintiffs of their constitutional rights. It is alleged that the union is designated as the sole collective bargaining agent for the workers, although they do not represent a "majority or substantial portion of the agricultural workers including plaintiffs. . . ." It is further alleged that plaintiffs ". . . for several years have worked for and have been employed by defendant growers on terms and conditions freely arrived at between themselves and said growers while enjoying the freedom to work and contract individually with said defendant growers without restraint, obstruction, interference or hindrance from any source." The complaint continues that plaintiffs are required to work under the terms of the contract, among the requirements of which are four provisions of which they make special complaint. These in summary are:

(1) Membership in defendant union is a condition of employment with defendant growers and that the employees of the growers as of the date of the contract must become members of the union within seven days of the execution of the contract or suffer termination.[1]

[1]Union security provisions similar to the one here involved are often given different labels depending on the degree of union security provided. A "union shop" provision, for example, is one under which the employer is free to hire nonunion employees but they must become employees within a specified period of time. A "closed shop," on the other hand, is one under which all employees must be union members unless the union is unable to furnish workers. If the union is unable to furnish workers, the employer can get nonunion workers but only if they become union members before the work commences. (*Chavez v. Sargent* (1959) 52 Cal.2d 162, 177-178, fn. 4.) Appellant characterizes the agreement herein as a "full union shop" or one in between a "closed shop" and a "union shop." Regardless of the tag put on the clause of this collective bargaining agreement, it is basically a "union security provision" and is treated almost identically to the others. (See *Chavez, supra,* fn. 4.)

(2) Whenever any grower requires workers he shall notify the union, which will use its best efforts to furnish the required workers; if unable to do so, the grower may then procure workers from other sources, but they too must become union members within seven days. The hiring clause of the contract provides referral priority in the order of (a) strikers, (b) the growers of prior employment, (3) new registrants.

(3) The union is given the right to require the grower to discharge any worker whom the union charges with antiunion activity when it presents to the employer written evidence of such activity. The worker is given the right to a hearing, but the union is granted the power to make the final decision with respect to the discharge.

(4) The grower is required to deduct or "check off" union initiation fees, dues and assessments from the employees' wages upon presentation of the individual authorization of the worker.

It is then alleged in substance that by virtue of the execution of the contract, defendant union and growers have and will continue to enforce the terms of this contract, in violation of plaintiffs' freedom

of association, right to work, freedom to pursue the occupation of their choice, freedom of thought, freedom of political action, freedom from unwarranted invasion of their right to privacy and other fundamental rights and liberties in violation of their constitutional rights secured under the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution, and sections 1, 9, 10 and 13 of article I of the California Constitution;[2] and that as a consequence of the enforcement of the agreement plaintiffs and members of the class have been threatened with discharge, have in fact been discharged, demoted, subjected to job classification, discrimination, transfer, and have been refused employment.

Plaintiffs pray for damages in excess of $5,000, a declaration of rights and responsibilities of all the

[2]Although appellants allege violation of rights under the California Constitution, they made no serious argument in support thereof in the trial court and have totally abandoned any argument in support thereof on appeal, placing their sole reliance upon the United States Constitution. This shift is probably dictated by the fact that union security covenants have been approved in California as a proper union objective. (*C. S. Smith Met. Market Co. v. Lyons* (1940) 16 Cal.2d 389; *McKay v. Retail Auto S.L. Union No. 1067* (1940) 16 Cal.2d 311, cert. den. 313 U.S. 566; *Petri Cleaners, Inc. v. Automotive Employees etc. Local No. 88* (1960) 53 Cal.2d 455; *Messner v. Journeymen Barbers etc. International Union* (1960) 53 Cal.2d 873; *Shafer v. Registered Pharmacists Union* (1940) 16 Cal.2d 379, 387; *Stephenson v. City of Palm Springs* (1959) 52 Cal.2d 407; *Chavez v. Sargent, supra,* 52 Cal.2d 162 (disapproved on other grounds, *Petri Cleaners, Inc. v. Automotive Employees etc. Local No. 88, supra,* 53 Cal.2d 455, 475).) Secondly, appellants desire to use such approval in support of their position that such encouragement and protection constitutes state action for the purpose of bringing them within the protection of the federal Constitution. Whatever the reason, since the California Constitution was not relied upon in the brief or on oral argument, it will be treated as waived. (*Coronet Credit Corp. v. West Thrift Co.* (1966) 244 Cal.App.2d 631, 641-642; 6 Witkin, Cal. Procedure (2d ed. 1971), Appeal, § 425, p. 4391.)

parties that the contract between the union and the growers is void and, thirdly, for an injunction against enforcing the provisions of the contract.

At the threshold we must determine if the cause has become moot by reason of the expiration of the contract between the union and growers of July 29, 1973.[3]

Events which occur during the pendency of an appeal may cause a matter to be moot (*Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129; *Callie v. Board of Supervisors* (1969) 1 Cal.App.3d 13), making it permissible to dispose of the appeal on that ground. In the case at bench, however, while the expiration of the contract has rendered the cause moot as to the declaratory and injunctive relief prayed for because no effectual relief could be granted (See *Paul v. Milk Depots, Inc., supra,* at pp. 132-133), the cause with respect to damages during the term of the contract is not moot; we therefore proceed to consider the matter on the merits with respect to the issue of damages only.

We turn to the controlling question of whether there is sufficient state action or action under color of state law to bring plaintiffs within the protection of the United States Constitution inasmuch as that instrument erects no shield against purely private conduct. (*The Civil Rights Cases* (1883) 109 U.S. 3; *Shelly v. Kraemer* (1948) 334 U.S. 1, 13.)[4]

[3]This fact is before us by virtue of the terms of the contract which is part of the pleadings and is conceded by plaintiffs in their affidavit submitted in opposition to a motion to dismiss on the ground that the cause is moot.

[4]Though not raised or argued by the parties, we have serious doubt (1) that plaintiffs have sufficiently alleged action under color of state law or (2) that they can state a cause of action for damages under the federal constitutional provisions

(This footnote is continued on next page)

California has no statute or policy either requiring that collective bargaining agreements include union shop provisions or invalidating such agreements. No facts are alleged in the pleadings to indicate other than that the growers and union entered into the collective bargaining agreement herein through private negotiations and through the normal give and take of collective bargaining without any compulsion of California law.

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pursuant to which they seek protection in a state court absent federal statutory authorization therefor.

Under the Civil Rights Act (42 U.S.C. § 1983) a state court probably has concurrent jurisdiction with the federal courts to entertain an action (*Long v. District of Columbia* (D.C. Cir. 1972) 469 F.2d 927, 937; *International Prisoners' Union v. Rizzo* (E.D. Pa. 1973) 356 F.Supp. 806, 810; contra: *Beauregard v. Wingard* (S.D. Cal. 1964) 230 F.Supp. 167, 185). However, the complaint does not allege the crucial requirement that the alleged deprivation of rights was "under color of state law." (*Place v. Shepard* (6 Cir. 1971) 446 F.2d 1239, 1244-1245; *Enrlich v. Van Epps* (7 Cir. 1970) 428 F.2d 363, 364; see *Seeley v. Brotherhood of Painters, Decorators, etc.* (5 Cir. 1962) 308 F.2d 52, 58.)

Aside from the Civil Rights Act, we find no federal statutory authorization for the instant action for damages. While *Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc.* (1971) 403 U.S. 388 [91 S.Ct. 1999] held for the first time that a damage action may be maintained in the federal court for an invasion of Fourth Amendment rights, we are persuaded that this authority probably cannot be invoked here because (a) that remedy is restricted to violation of Fourth Amendment rights (*Smothers v. Columbia Broadcasting System, Inc.* (C.D. Cal. 1972) 351 F.Supp. 622, 625-626; *Davidson v. Kane* (E.D. Va. 1972) 337 F.Supp. 922, 924), and (b) the remedy is a federal court remedy (see *Bivens, supra,* at pp. 396-397; *Breitwieser v. KMS Industries, Inc.* (5 Cir. 1972) 467 F.2d 1319) cert. den. ..... U.S. ..... [93 S.Ct. 1445]; *Monarch Insurance Co. of Ohio v. District of Columbia* (D.D.C. 1973) 353 F.Supp. 1249; *Larez v. Oberti* (1972) 23 Cal.App. 3d 217, 223-225).

In any event, we do not reach or pass upon these questions because of our disposition of the cause on the ground that there is not sufficient state action to invoke federal constitutional protections.

What constitutes state action under a given set of facts is to be determined on a case-by-case basis. As stated in *Burton v. Wilmington Parking Authority* (1961) 365 U.S. 715, 722:

> "It is clear, as it always has been since the *Civil Rights Cases* . . . that 'Individual invasion of individual rights is not the subject-matter of the amendment,' [citation] and that private conduct abridging individual rights does no violence to the Equal Protection Clause (and thus the Fourteenth Amendment in general) unless to some significant extent the state in any of its manifestations has been found to have become involved in it. Because ... virtue of the right to equal protection of the laws could lie only in the breadth of its application, its constitutional assurance was reserved in terms whose imprecision was necessary if the right were to be enjoyed in the variety of individual-state relationships which the Amendment was designed to embrace. For the same reason, to fashion and apply a precise formula for recognition of state responsibility under the Equal Protection Clause is an 'impossible task' which 'this court has never attempted.' [Citation.]"

Evans v. Newton (1965) 382 U.S. 296, 299, instructs:

> "What is 'private' action and what is 'state' action is not always easy to determine. [Citation.] Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action."

Appellants argue that the action of the union and owners in entering into the agreement constitutes state

action because California has encouraged and protected union shop agreements. They point to Labor Code section 921 outlawing yellow-dog contracts (*Petri Cleaners, Inc. v. Automotive Employees etc. Local No. 88* (1960) 53 Cal.2d 458, 470), Labor Code section 922 making it a misdemeanor for any person to coerce or compel any person to agree not to join a labor organization as a condition of employment, and Labor Code section 923 declaring it to be public policy that the individual workman shall have freedom of association, self-organization and designation of representatives of his own choosing to negotiate the terms and conditions of his employment, free from interference of employers. They also point to Labor Code section 1126, making collective bargaining agreements enforceable in law and equity. Reference is also made to certain California decisions which uphold the validity of union security agreements (see *C. S. Smith Met. Market Co. v. Lyons, supra,* 16 Cal.2d 389; *Park & T.I. Corp. v. Int. etc. of Teamsters* (1946) 27 Cal.2d 599; *McKay v. Retail Auto S.L. Union No. 1067* (1940) 16 Cal.2d 311, cert. den. 313 U.S. 566; *Petri Cleaners, Inc. v. Automotive Employees etc. Local No. 88, supra,* 53 Cal.2d 455; *Messner v. Journeymen Barbers, etc.* (1960) 53 Cal.2d 873), and finally to certain decisions which have held that local "right to work" ordinances are invalid because the above referred to statutes preempt such local action. (*Stephenson v. City of Palm Springs* (1959) 52 Cal.2d 407; *Chavez v. Sargent* (1959) 52 Cal.2d 162 (disapproved on other grounds, *Petri Cleaners, Inc. v. Automotive Employees etc. Local No. 88, supra,* 53 Cal.2d 455, 475); *Retail Clerks' Union v. Superior Court* (1959) 52 Cal.2d 222 (disapproved on other

grounds, *Petri Cleaners, Inc. v. Automotive Employees etc. Local No. 88, supra,* 53 Cal.2d 455, 475).)

In our view, however, the state policy so announced and the case decisions referred to do not change the fundamental fact that California has taken no action either to require the inclusion of a union shop provision in a collective bargaining agreement or to invalidate such a provision. A collective bargaining agreement without a union shop covenant is entitled to legal protection. The position of the state can best be characterized as one of benign neutrality in that labor and management are free from any hindrances upon opportunities to bargain collectively. The Legislature has in effect left the field unregulated, neither requiring nor prohibiting union shop provisions but lending its support and encouragement to collective bargaining agreements freely entered into and making them equally enforceable in the courts whether such agreements do or do not contain union shop provisions. Such passivity falls far short of the state action required to bring the federal constitutional protections into operation.

Mendoza v. United Farm Workers Organizing Committee (9 Cir. 1973) .... F.2d. ....[5] is a class action companion to the case at bench, commenced against the same defendants, regarding the same collective bargaining contract and seeking the same relief by a different party plaintiff farm worker. The Circuit Court affirmed the judgment of dismissal entered by the Federal District Court on the ground that the complaint failed to allege such state action as the Fourteenth Amendment of the United States Constitution requires. The court said:

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[5]Slip opinion filed September 7, 1973, No. 71-1930, United States Circuit Court for the Ninth Circuit.

"The present complaint does not allege that the defendants entered into and performed their union shop agreement under any compulsion of California law rather than through the normal give and take of collective bargaining and labor-management relations. We add that we have found nothing in California law that coerces parties to include union shop provisions in a labor contract. In these circumstances, we agree with the district court that the complaint was inadequate."

In *Adams v. Southern California First National Bank* (9 Cir. 1973) .... F.2d ....,[6] the court held that the enactment of sections 9503 and 9504 of the California Commercial Code authorizing, codifying and recognizing a preexisting prejudgment self-help remedy by repossession and sale of secured property did not constitute sufficient state action to establish a federal cause of action under protections afforded by the United States Constitution. The court pointed to the fact that the codification was of a preexisting policy and "[t]here is no 'pervasive' state action directed to self-help repossession to require its use. It is simply named as one of two already existing alternatives." The court further stated that the State of California had not "significantly involved" itself in self-help repossession by virtue of having authorized such action in the statutory enactment under the test laid down by the Supreme Court in *Moose Lodge No. 107 v. Irvis* (1972) 407 U.S. 163, 173, where the court said: "Our holdings indicate that where the impetus for the discrimination is private, the State must have 'significantly involved

[6]42 Law Weekly 2230, slip opinion filed October 4, 1973, United States Circuit Court of Appeals for the Ninth Circuit, Nos. 72-1484 and 72-1888.

itself . . .' to fall within the ambit of the constitutional prohibition."

In *Moose Lodge No. 107 v. Irvis, supra,* 407 U.S. 163, a black guest was denied service in the Moose Lodge bar, which was licensed as a private club by the Pennsylvania Liquor Control Board. Licenses were limited and the control board imposed a detailed regulatory scheme upon licensees. The court stated that, "The court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the state, or if it is subject to state regulation in any degree whatever" (407 U.S. at p. .... [92 S.Ct. at p. 1971]), and continues that ". . . the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge so as to make the latter 'State action' within the ambit of the Equal Protection Clause of the Fourteenth Amendment." (407 U.S. at p. .... [92 S.Ct. at p. 1973]). In effect the court held that even a clear, detailed regulation and licensing control system, including quotas, does not represent state action where the precise rules or conditions limiting conduct are voluntarily agreed upon by the private parties engaged in private affairs. While this expression may demonstrate a trend away from prior expressions of the Supreme Court of the United States, we are nevertheless bound by it.

Appellants' reliance is placed principally on *Railway Employees' Department v. Hanson* (1956) 351 U.S. 225 [76 S.Ct. 714]). In that case Congress had enacted the Railway Labor Act, 45 U.S.C.A. § 151 et seq.,

which provided in part that a union shop was permissible notwithstanding the law of any state. (45 U.S.C.A. § 152 (Eleventh).) The court found that this statute was enacted for the purpose of superseding inconsistent "right to work" laws in seventeen states which prohibited union shops. (351 U.S. 225, 231-232 [76 S.Ct. 714, 718].) Thus the court held that by so allowing union shop clauses, action undertaken pursuant to these contract clauses constituted governmental action sufficient to invoke the protection of the Constitution because without such congressional action the union shop clause would have been unlawful in those seventeen states.

Appellants assert that the *Hanson* situation is analogous to the situation in California because the Legislature has enacted laws which have been interpreted to preempt local "right to work" ordinances. (See *Retail Clerks' Union v. Superior Court, supra,* 52 Cal.2d 222: *Stephenson v. City of Palm Springs, supra,* 52 Cal.2d 407; *Chavez v. Sargent, supra,* 52 Cal.2d 162.) Nevertheless, there are crucial distinctions between *Hanson* and the situation here presented which dictate the conclusion that there is not sufficient state action here involved. To begin with, the California statute which has been interpreted to occupy the field and thus preempt inconsistent right to work ordinances does not, as did the Railway Labor Act, expressly refer to union shops. (See Lab. Code, §§ 921-923.) Secondly, the union shop has always been lawful in California and thus the enactment of the above referred to Labor Code sections did not divert from the traditional policy of the state. (*Shafer v. Registered Pharmacists Union, supra,* 16 Cal.2d 379, 387.) Furthermore, the local right to work ordinances did not originate until well

after the enactment of the controlling sections of the Labor Code, while in *Hanson* the right to work laws were enacted prior to the union shop provision of the Railway Labor Act which was designed to supersede them. These distinctions were recognized in *Otten v. Baltimore & O. R. Co.* (2 Cir. 1953) 205 F.2d 58 and *Wicks v. Southern Pac. Co.* (S.D. Cal. 1954) 121 F.Supp. 454 (affirmed 231 F.2d 130 (9 Cir. 1956), cert. den. 351 U.S. 946). In the *Otten* case, the plaintiffs sought an injunction prohibiting the defendant railroad from discharging him pursuant to a union shop provision authorized by the Railway Labor Act. The district court declined to convene the three-judge district court on the grounds that the constitutionality of the Railway Labor Act was not called into question. On appeal, the court, per L. Hand, J., held that it was proper not to convene the three-judge court because the constitutionality of the act could in no way have been called into question. The court reasoned that if the union shop had originally been unlawful in New York where the case arose and the Railway Labor Act was to the contrary, then there may have been sufficient governmental action to call into question the validity of the act. The court held, however, that since the union shop had always been valid under New York common law, then Congress' enactment of the Railway Labor Act was not sufficient governmental action as to this New York plaintiff to call into question the constitutionality of the act. (205 F.2d at pp. 60-61). The facts presented in the *Otten* case were almost identical to those presented in *Wicks v. Southern Pac. Co., supra,* 121 F.Supp. 454. In *Wicks,* the court held that since California, like New York, had always permitted the union shop, then the constitutionality of the act could not be ques-

tioned in that proceeding. (231 F.2d 130, 135-137; 121 F.Supp. 454, 456-457.)

It is thus concluded that the California policy of allowing union and closed shops and the consequent preemption of subsequently enacted inconsistent local ordinances does not constitute sufficient state action to invoke the sanctions of the federal Constitution.

Inasmuch as we have concluded that state action was not involved in the making or implementation of the collective bargaining contract between the union and the growers, plaintiffs cannot invoke the protection of the federal Constitution, and we need not treat the other questions raised.

The judgment is affirmed.

CERTIFIED FOR PUBLICATION.

/s/ Brown (Geo. A), *P. J.*

We concur:

/s/ Gargano, *J.*

/s/ Franson, *J.*

APPENDIX D.

Principal Constitutional and Statutory Provisions Involved.

FEDERAL CONSTITUTIONAL PROVISIONS:

1. First Amendment to the Constitution of the United States:

   "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

2. Fifth Amendment to the Constitution of the United States:

   "No person shall be held to answer for a capital, of other infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal offense to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

3. Ninth Amendment to the Constitution of the United States:

   "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

4. Fourteenth Amendment to the Constitution of the United States:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Federal Statutory Provisions.

Civil Rights Statutes:

28 USC § 1343:

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens

or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote. June 25, 1948, c. 646, 62 Stat. 932; Sept. 3, 1954, c. 1263, § 42, 68 Stat. 1241; Sept. 9, 1957, Pub.L. 85-315, Part III, § 121, 71 Stat. 637.

42 USC § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.
R.S. § 1979.

Union Shop Provisions of the Railway Labor Act:

45 USC § 152, Eleventh:

Eleventh. Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective

date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided,* That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First Division of paragraph (h) of section

153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than that in which he holds membership: *Provided, however,* That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further,* That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186; June 25, 1948, c. 646, § 1, 62 Stat. 909; Jan. 10, 1951, c. 1220, 64 Stat. 1238.

Union Shop Provisions of the National Labor Relations Act:

29 USC 158(a) (3):

(a) It shall be an unfair labor practice for an employer—

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and

conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

California Statutes.

1. LABOR CODE, § 921:

"Every promise made after August 21, 1933, between any employee or prospective employee and his employer, prospective employer or any other person is contrary to public policy if either party thereto promises any of the following:

(a) To join or to remain a member of a labor organization or to join or remain a member of an employer organization.

(b) Not to join or not to remain a member of a labor organization or of an employer organization.

(c) To withdraw from an employment relation in the event that he joins or remains a member of a labor organization or of an employer organization.

Such promise shall not afford any basis for the granting of legal or equitable relief by any court against a party to such promise, or against any other persons who advise, urge, or induce, without fraud or violence or threat thereof, either party thereto to act in disregard of such promise."

2. LABOR CODE, § 922:

"Any person or agent or officer thereof who coerces or compels any person to enter into an agreement, written or verbal, not to join or become a member of

any labor organization, as a condition of securing employment or continuing in the employment of any such person is guilty of a misdemeanor."

3. LABOR CODE, § 923:

"In the interpretation and application of this chapter, the public policy of this State is declared as follows:

Negotiation of terms and conditions of labor should result from voluntary agreement between employer and employees. Governmental authority has permitted and encouraged employers to organize in the corporate and other forms of capital control. In dealing with such employers, the individual unorganized worker is helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment. Therefore it is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

4. LABOR CODE, § 1011:

"A person engaged in the production, manufacture, or sale of any article of merchandise in this State, shall not, by any label placed or impressed upon such article, or upon its container, misrepresent or falsely state any of the following as to the production of such article:

(a) The kind, character, or nature of the labor employed.

(b) The extent of the labor employed.

(c) The number or kind of persons exclusively employed.

(d) That a particular or distinctive class or character of laborers was wholly and exclusively employed, when in fact another class, or character, or distinction of laborers was used or employed either jointly or in any wise supplementary to such exclusive class, character, or distinction of laborers.

Violation of any provision of this section is a misdemeanor punishable by a fine of not less than one hundred dollars ($100) nor more than five hundred dollars ($500) or by imprisonment for not less than 20 nor more than 90 days, or both."

5. LABOR CODE, § 1012:

"Any person engaged in the production, manufacture, or sale of any article of merchandise in this State, or any person engaged in the performance of any acts or services of a private, public, or quasi-public nature for profit, who wilfully misrepresents or falsely states that members of trades unions, labor associations, or labor organizations were engaged or employed in the manufacture, production, or sale of such article or in the performance of such acts or services, is guilty of a misdemeanor punishable by a fine of not more than five hundred dollars ($500), or by imprisonment in the county jail for not more than 90 days, or both."

6. LABOR CODE, § 1015:

"Any person who, without having an unrevoked written authority from such trade union, labor association or labor organization, wilfully forges or procures to be forged such label or trademark, with intent to sell or assist other persons to sell, any goods to which such forged label is affixed as having been made, manufactured, or produced in whole or in part by labor, laborers, or employees who are members of, or allied or associated with, such trade union, labor association, or labor organization, is guilty of a misdemeanor, punishable by a fine not more than five hundred dollars ($500) or imprisonment for not more than 90 days, or both."

7. LABOR CODE, § 1016:

"Any person who wilfully uses or displays the genuine label, trademark, insignia, seal, device, or form of advertisement of any association or labor union, in any manner not authorized by such association or labor organization or not in conformity with the by-laws thereof, is guilty of a misdemeanor punishable by a fine not exceeding one hundred dollars ($100) or imprisonment for not more than three months, or both."

8. LABOR CODE, § 1017:

"Any person who wilfully uses the card of any labor union to obtain aid, assistance, or employment, unless entitled to use such card under the rules and regulations of a labor union within this State is guilty of a misdemeanor."

9. LABOR CODE, § 1018:

"Any person who wilfully wears the button of any labor union of this State, unless entitled to wear the button under the rules of such union, is guilty of a misdemeanor, and is punishable by imprisonment in the county jail for not more than 20 days or by a fine of not more than twenty dollars ($20), or by both fine and imprisonment."

10. LABOR CODE, § 1126:

"Any collective bargaining agreement between an employer and a labor organization shall be enforceable at law or in equity, and a breach of such collective bargaining agreement by any party thereto shall be subject to the same remedies, including injunctive relief, as are available on other contracts in the courts of this State."

11. BUSINESS AND PROFESSIONAL CODE, § 16703:

"Within the meaning of this chapter, labor, whether skilled or unskilled, is not a commodity."

Supreme Court, U. S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 75-1856

LARRY PONCIANO, *et al.*,

Petitioners,

vs.

UNITED FARM WORKERS ORGANIZING COMMITTEE, *et al.*,

Respondents.

RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT.

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Dated: July 19, 1976.

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RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT.

QUESTIONS PRESENTED.

1. Does enforcement by respondent labor organization and employers of their collective bargaining contract involve state action by California, whose statutes and decisional law in general have authorized, approved, and encouraged the

institution of the "union shop"?

2. Is an agreement requiring membership "following seven (7) continual calendar days of employment" in itself violative of any right of association or right to work protected by the United States Constitution?

STATEMENT OF THE CASE.

Petitioners do not allege that the contract in question requires "compulsory full union membership as a condition of employment."

Petitioners do not allege that they have been denied employment because they have been refused membership in respondent union after making request therefor.

I

PETITIONERS DO NOT ALLEGE FACTS SUFFICIENT TO CONSTITUTE THE REQUISITE STATE ACTION.

A fair reading of the Court of Appeals' decision reveals that Court in no sense applies a test of "compulsion of state law." *Shelley v. Kraemer*,

334 U.S. 1 (1947), established a state action standard—significant, unambiguous involvement in a particular transaction—from which the Court has never retreated. Rather than showing some immediate and direct effect of state activity, petitioners show only the probabilities of how some court in California might some day deal with the collective bargaining agreement in question.

This Court recently held in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), that state activity much more direct and substantial than the involvement in the present case was insufficient to state a claim under the Constitution; even a state's detailed regulation and licensing with quotas imposed does not represent state action where the preceise rules or conditions limiting conduct are voluntarily agreed upon by the private parties engaged in private affairs.

It is indisputable that California in its statutes and case law has maintained

a strict policy of neutrality towards collective bargaining matters and has simply attempted "to balance the industrial equation, so far as it is possible to do so, by placing employer and employee on an equal basis," *Shafer v. Registered Pharmacists Union Local 1172*, 16 Cal. 2d 379 (1940). Section 923 of the California Labor Code, set out at page 26, of the Petitioners' Appendix, states that governmental authority "has permitted and encouraged employers to organize in the corporate and other forms of capital control," and so therefore it "is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment."

Thus, the California Court of Appeal, Fifth Appellate District concluded in an earlier suit involving identical issues, that sufficient state action was not present to invoke federal constitutional protections:

In our view, however, the state policy so announced and the case decisions referred to do not change the fundamental fact that California has taken no action either to require the inclusion of a union shop provision in a collective bargaining agreement or to invalidate such a provision. A collective bargaining agreement without a union shop covenant is entitled to legal protection. The position of the state can best be characterized as one of benign neutrality in that labor and management are free from any hindrances upon opportunities to bargain collectively. The Legislature has in effect left the field unregulated, neither requiring nor prohibiting union shop provisions but lending its support and encouragement to collective bargaining agreements freely entered into and making them equally enforceable in the courts whether such agreements do or do not contain union shop provisions.

> Such passivity falls far short of the state action required to bring the federal constitutional protections into operation. *Gabaldon, et al. v. United Farm Workers Organizing Committee*, 35 Cal. App. 3d 757 at 765, 111 Cal. Rptr. 203 at 207; Hearing Denied January 31, 1974; cert. den., 416 U.S. 957, 94 S. Ct. 1972. (emphasis added).

The language from *Railway Employees Dept. AFL v. Hanson*, 351 U.S. 225 (1956), quoted by Petitioners at page 9 of their brief, is the explanation by this Court of its agreement with a statement of the Nebraska high court. As quoted by Petitioners, this Court said:

> "The union shop provision of the Railway Labor Act is only permissive. Congress has not compelled nor required carriers and employees to enter into union shop agreements * * *. The enactment of the federal statute authorizing union shop agreements is the governmental action on which the Constitution operates, though it takes a private agreement to invoke the federal sanction." 351 U.S. at 231, 232.

In its opinion the Nebraska Supreme Court had referred to the 17 states which at the time of Congress' action had right-to-work provisions. Thus, the action of Congress in *Hanson* had cut across state law already in effect, permitting contracts that otherwise would be outlawed by the states' statutes.

There is no analogy between California Supreme Court action and the *Hanson* facts. In the California cases cited in support of Petitioners' contention, the California Court merely shielded agreements from nullification by local laws enacted subsequent to formalization by the legislature of the state's traditional hands-off policy.

II

PETITIONERS DO NOT ALLEGE FACTS WHICH CONSTITUTE A VIOLATION OF RIGHTS PROTECTED BY THE UNITED STATES CONSTITUTION.

The *Hanson* case, *supra*, demonstrates that constitutional issues do not arise alone out of the terms of contracts or out of union constitutions. See *Hanson* at footnotes 7, 8, and 9 and the text they amplify. Here, as in *Hanson*, Petitioners protest against what is comparable to the requirement in some states that a lawyer become a member of an integrated bar. 351 U.S. at 238.

Moreover, in finding that Congress' choice of the union shop as a stabilizing force was proper, this Court in *Hanson* noted that the right to work must be looked at in terms of "long-range interests of workers." 351 U.S. at 234.

> "One would have to be blind to history to assert that trade unionism did not enhance and strengthen the right to work . . . To require, rather than to induce, the beneficiaries of trade unionism to contribute to its costs may not be the wisest course. But Congress might well believe that it would help insure the right to work. . . ."
> *Hanson, supra*, 351 U.S. at 235.

III

THE ISSUES RAISED HAVE ALREADY BEEN FINALLY ADJUDICATED.

The case at bar is one of three virtually identical lawsuits commenced against virtually the same defendants, regarding the same collective bargaining agreement, seeking the same relief, and raising the identical legal issues. The only difference is that the three suits were brought in behalf of different sets of plaintiffs. Two of these three lawsuits have already been before this Court. In both cases, certiorari was denied. *Delores Mendoza et al. v. United Farm Workers Organizing Committee et al.*, 487 F.2d 311, cert. den. 415 U.S. 918 (1974); *Gabaldon et al. v. United Farm Workers Organizing Committee*, *supra* at page 6.

The third case, currently before this Court, was summarily dismissed by both the Court of Appeal of the State of California for the Fifth Appellate District and the Supreme Court of California. As the Fifth District so succinctly stated,

the instant case simply attempts to rehash issues which have already been resolved.

> In what we thought to be a definitive opinion, the court decided the *Gabaldon* case in favor of the defendant union and growers on the ground that ". . . state action was not involved in the making or implementation of the collective bargaining contract between the union and the growers [and] plaintiffs cannot invoke the protection of the federal Constitution. . . ." (35 Cal. App. 3d at 768.)
>
> Plaintiffs have presented no new authorities or issues.[1] They merely re-present and reargue the same issues and authorities that were thoroughly briefed and discussed in *Gabaldon*, and we consider that case and the authorities therein dispositive. Petitioners' Appendix A at page 1.

It is basic judicial logic and philosophy that the Court's time is precious. The instant issues have already cost many hours of judicial time in this Court as well as in the courts below. To continue this matter when Court calendars are years behind with matters of great personal and constitutional impact would be frivolous.

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[1]It is true that in *Gabaldon* we expressed doubt "that plaintiffs have sufficiently alleged action under color of state law . . ." (*Gabaldon v. United Farm Workers Organizing Committee*, *supra*, 35 Cal. App. 3d at page 762, fn. 4) and that in the case at bench plaintiffs alleged what they considered to be state action. However, we did not decide the *Gabaldon* case on the ground of inadequate allegations of state action but assumed those allegations to be present. The inclusion therefore of the allegations of state action in the instant complaint, which we assumed to be present in the *Gabaldon* action, does not change the result herein.

CONCLUSION.

For all these reasons this Court should not issue a writ of certiorari.

July 19, 1976.

Respectfully submitted,

JEROME COHEN

Attorney for Respondents.